IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION
Civil Action No: 4:17CV00032

CLERK'S OFFICE U.S. DIST. COURT
AT DANVILLE, VA
FILED

MAY 11 2017

JULIA C. DUDLEY, CLERK
BY: s/H. McDonald
DEPUTY CLERK

DUKE ENERGY PROGRESS, LLC,

Plaintiff,

v.

ROANOKE RIVER BASIN ASSOCIATION,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE PARTIES 2

III. JURISDICTION AND VENUE 3

IV. STATEMENT OF FACTS 4

A. Roxboro and its Wastewater Treatment System 4

B. The Clean Water Act and Its Section 404 and National Pollutant Discharge Elimination System ("NDPES") Permitting Programs 14

i. The Waste Treatment System Exclusion 15

ii. The Act Does Not Apply to Pollution of Groundwater 18

C. Roxboro's Permitting History 19

D. Current Operations of Roxboro's Wastewater Treatment System 22

E. The Roxboro State Enforcement Action 25

F. RRBA's Notice 27

i. RRBA's First Allegation (the "Waste Treatment System Claims") 27

ii. RRBA's Second Allegation (the "Permit Claims") 28

iii. RRBA's Third Allegation (the "Hydrological Connection Claim") 28

V. CLAIMS FOR RELIEF 29

COUNT ONE:
Declaratory Judgment That the
Roxboro Treatment Works are Not "Waters of the United States" 29

COUNT TWO:
Declaratory Judgment That the
Clean Water Act Does Not Regulate Discharges to Groundwater 30

COUNT THREE:
Declaratory Judgment that Roxboro's Ash Basins Do Not
Constitute Unpermitted Point Sources for Discharge to Groundwater 31

COUNT FOUR:
Declaratory Judgment That the Migration of Constituents From Roxboro's Ash Basins Into Groundwater Does Not Violate the Act 33

COUNT FIVE:
Declaratory Judgment that Roxboro is in compliance with the Roxboro NPDES Permit 34

COUNT SIX:
Declaratory Judgment that Roxboro is in compliance with the Act 37

COUNT SEVEN:
Declaratory Judgment that RRBA Cannot Collaterally Attack the Roxboro NPDES Permit 38

COUNT EIGHT:
Declaratory Judgment that Diligent Prosecution of the State Action Bars RRBA's Claims 39

VI. PRAYER FOR RELIEF 41

I. INTRODUCTION

Plaintiff Duke Energy Progress, LLC ("Plaintiff" or "Duke Energy") brings this action against the Roanoke River Basin Association ("Defendant" or "RRBA"), an advocacy group that unlawfully seeks to impose, through initiation of a civil action under an unlawful interpretation of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("the Act") and permits issued thereunder, restrictions and costs on the permitted operation of the Roxboro Steam Electric Station ("Roxboro"), a coal-fired power plant located on an over-6000 acre site ("the Site") in Person County, North Carolina. Specifically, RRBA contends that Roxboro is unlawfully discharging pollutants into "waters of the United States" in violation of applicable permits and the Act.

RRBA is wrong. Duke Energy has not violated the Act or the terms of the applicable permit, as RRBA has alleged. First, Duke Energy does not make unpermitted discharges to "waters of the United States," as RRBA claims. The areas that RRBA alleges to receive the unlawful discharges of pollutants are not "waters of the United States," but in fact are components of the wastewater treatment system (the "Treatment Works") created by Duke Energy, with the full knowledge and approval of the State of North Carolina, for the treatment of wastewater ***prior to*** discharge to jurisdictional waters. Second, Duke Energy does not make illegal discharges to "waters of the United States" by discharging pollutants to groundwater hydrologically connected to those water bodies, as alleged by RRBA, for two independent reasons: (a) RRBA fails to identify a "water of the United States" receiving the alleged groundwater flow; and (b) the Act does not regulate the migration of pollutants into groundwater, even if that groundwater has some "hydrological connection" to a water of the United States. RRBA's theory of liability would expand the scope of federal regulation under the Act far beyond that which Congress intended, and intrude upon matters traditionally left to the States. Third, Duke Energy is not violating any provision in the applicable Clean Water Act permit, as alleged by RRBA. RRBA bases these allegations on misreadings of that permit, which have been refuted by the agency that wrote the permit. Even if RRBA had some legal basis for the allegations it has raised, it could not pursue them. North Carolina's diligent prosecution of an enforcement action concerning Roxboro bars RRBA from pursuing its claims in the threatened citizen suit. RRBA disputes the application of this defense, however, and threatens to bring a citizen suit at a time and place of its choosing.

Through its unlawful interpretation of the Act and the applicable permit issued thereunder, RRBA seeks to impose retroactive liability upon Duke Energy—liability that would increase with each passing day. A real and justiciable controversy exists between Duke Energy and RRBA over (1) whether Roxboro operates in compliance with the applicable permit and the Act, and (2) whether RRBA may pursue the claims it has alleged against Duke Energy. Declaratory relief is required to resolve this controversy.

II. THE PARTIES

1. Plaintiff is a North Carolina limited liability corporation having its principal place of business in Raleigh, North Carolina. Plaintiff owns and operates Roxboro and the Site on which it is located, less than four miles from the North Carolina/Virginia border.

2. Defendant RRBA is a § 501(c)(3) advocacy group, with its principal place of business in Danville, Virginia. RRBA opposes the operation of ash basins at coal-fired power plants, the primary mechanism by which such plants have treated and released wastewater for decades. On March 13, 2017, RRBA issued a notice of intent to sue Duke Energy (the "Notice") for alleged violations of the Act at Roxboro, a copy of which is attached as Exhibit A hereto. In the threatened suit, RRBA would (1) make an impermissible collateral attack on the validity of Duke Energy's National Pollutant Discharge Elimination System ("NPDES") Permit No. NC0003425 for Roxboro, (2) attack Duke Energy's use of its Treatment Works created prior to

enactment of the Act, with the full knowledge and approval by the State of North Carolina, by having these Treatment Works declared "waters of the United States" subject to regulation under the Act, (3) advance an unlawful interpretation of the Act that would transfer regulation of groundwater from state to federal control, and (4) seek to hold Duke Energy liable on the basis of novel interpretations of the NPDES permit for Roxboro—interpretations rejected by the agency that authored the permit.

3. RRBA's Notice threatens to bring this citizen suit in North Carolina "or other appropriate court" at any time after the statutory notice period expires. Ex. A at 34. This Court is an appropriate court for resolution of this dispute.

III. JURISDICTION AND VENUE

4. This United States District Court has jurisdiction to declare the rights of any interested party, requesting such declaration, in a case of actual controversy within its jurisdiction. Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

5. RRBA's Notice threatening to sue Duke Energy for alleged ongoing violations of the Act, which Duke Energy expressly denies, creates an actual, justiciable controversy. The Notice threatens to pursue civil penalties as well as injunctive relief for the alleged ongoing violations. Civil penalties accrue at a rate of up to $52,414 per day of violation. 82 Fed. Reg. 3601, 3636 (Jan. 12, 2017). All prerequisites to this Court's jurisdiction have been met. This dispute is subject to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

6. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including, *inter alia*, the Clean Water Act, 33 U.S.C. §§ 1251, *et seq*.

7. Personal jurisdiction over RRBA is proper in this Court because RRBA's principal place of business is in Danville, Virginia, which is located in the judicial district of the

Western District of Virginia. RRBA alleges that it has members in Virginia, and that "its members have been harmed by Duke Energy's unpermitted discharges and unlawful activities." Ex. A at 34. RRBA further alleges that its members "swim, fish, boat, and own property in the Roanoke River Basin, including at and around Hyco Lake and Kerr Lake." *Id.* Kerr Lake is located in Virginia. Finally, RRBA alleges that Duke Energy's discharge of wastewater from its Roxboro facility flows into and contaminates navigable waters of Virginia. *Id.* at 2, 9, 34.

8. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) because RRBA's principal place of business is in Danville, Virginia, which is in the Western District of Virginia.

9. By filing this action, Duke Energy hereby waives any argument it may have that 33 U.S.C. § 1365(c)(1) would require a different venue for this dispute. *See Long Beach Tp. v. City of New York*, 445 F. Supp. 1203, 1207 n.2 (D.N.J. 1978) (holding that an alleged violator may waive the venue requirement in § 1365(c)(1)).

IV. STATEMENT OF FACTS

A. Roxboro and its Wastewater Treatment System

10. Roxboro is a four-unit, 2,422 megawatt coal-fired steam electric generating plant that has been in operation since 1966. The generating units operate by burning coal to boil water, producing steam which then spins turbo-generators in order to produce electricity. This process also produces wastewater in various forms, whether from sluicing the ash produced by burning coal, or in the form of water produced by air pollution control equipment, such as flue gas desulfurization wastewater.

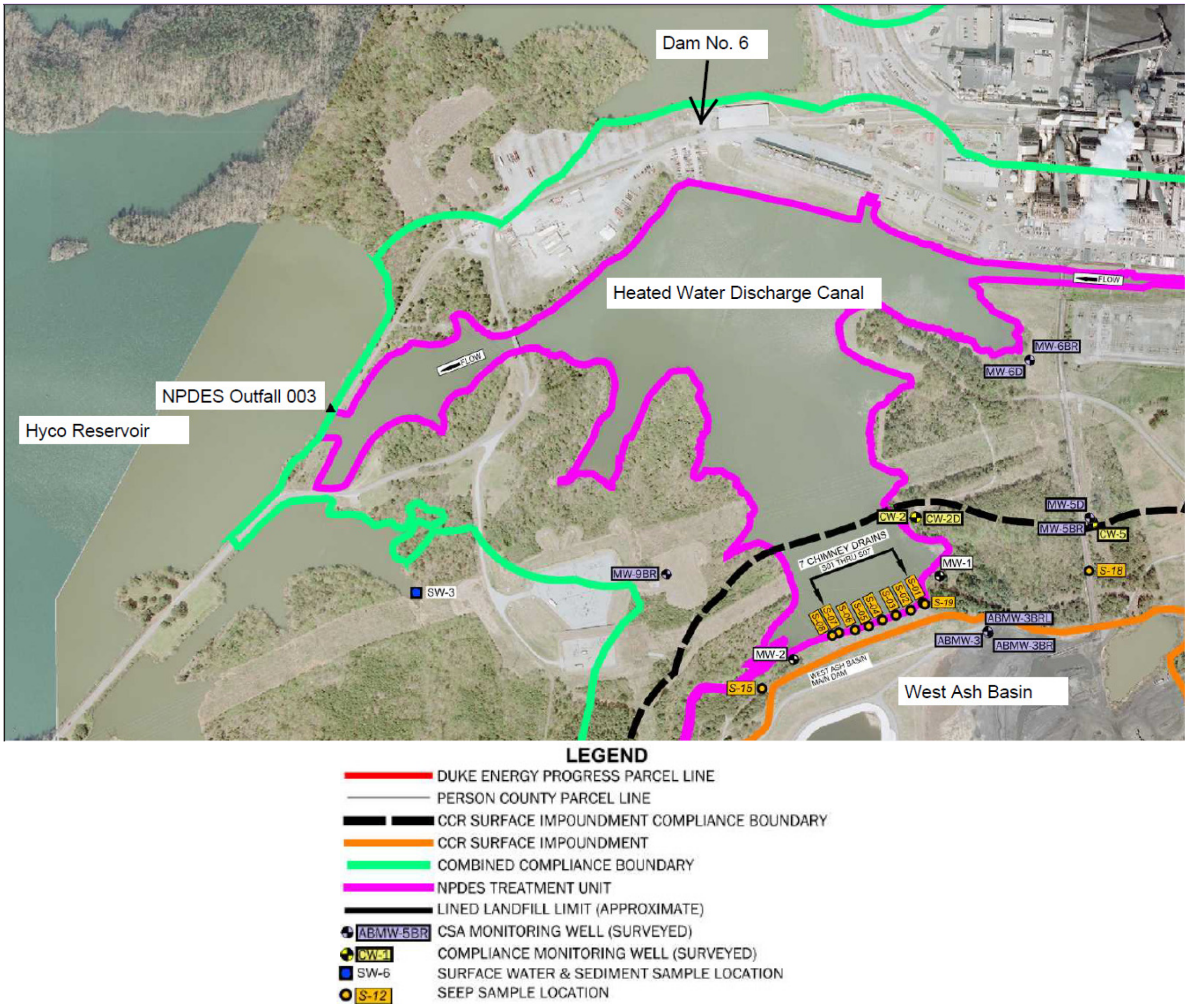
11. As required by law, this wastewater is treated before it is discharged by Duke Energy to waters of the United States, pursuant to permit. The wastewater treatment system was designed, constructed, and permitted to operate in a manner such that all aspects of the waste treatment system, as well as any ground waters with which they may interact, form a single

integrated hydrologic system that operates entirely within the Site's property boundary. The applicable technology-based requirements for existing steam electric plants, adopted by the United States Environmental Protection Agency ("EPA") pursuant to Sections 301 and 304 of the Act in 1974, and revised in 1982, contemplated the use of surface impoundments for the treatment of fly and bottom ash sluice water, low volume wastes, and coal pile runoff. *See* 39 Fed. Reg. 36186 (Oct. 8, 1974) and 47 Fed. Reg. 52290-01 (Nov. 19, 1982).

12. The first components of the wastewater treatment system at Roxboro were constructed between 1964 and 1966 with the creation of a cooling pond ("Hyco Reservoir") to provide a source of cooling water for the coal-fired steam electric generating units at the Roxboro plant, and a water circulating system (including a heated water discharge canal system) to treat heated water discharged from the waste treatment system prior to the water's discharge to Hyco Reservoir at the discharge point currently identified as Outfall 003 in Figure 1, *infra*. Upon information and belief, Hyco Reservoir was created by impounding a non-navigable stream. The North Carolina State Stream Sanitation Committee issued Permit No. 522 on May 4, 1964 that approved the construction and operation of these facilities, and the North Carolina Board of Water and Air Resources issued a Certificate of Approval on October 1, 1971 certifying that the facilities were constructed and placed into operation, comply with the requirements of the Board of Water and Air Resources, and are being effectively operated in accordance with the terms of Permit No. 522.

13. The Heated Water Discharge Canal is a man-made body of water created by Duke Energy prior to 1966 by constructing an earthen dam that connects the land on which the generating units sit to the land that borders Hyco Reservoir ("Dam No. 6"). *See* Figure 1, *infra.* A canal was constructed to the west of Dam No. 6 to allow water from the Heated Water

Discharge Canal to pass into Hyco Reservoir (current NPDES Outfall 003). *Id.* Upon information and belief, the North Carolina State Stream Sanitation Committee and the North Carolina Board of Water and Air Resources approved these construction activities. The Heated Water Discharge Canal has been used as part of the Treatment Works at Roxboro since its construction by Duke Energy. The Heated Water Discharge Canal was originally designed as a thermal mixing basin to treat heated water from the condensers at the Roxboro plant prior to the water's discharge to Hyco Reservoir at the discharge point currently identified as Outfall 003. The Heated Water Discharge Canal is not, and never has been, part of Hyco Reservoir.



Dam No. 6
Heated Water Discharge Canal
NPDES Outfall 003
Hyco Reservoir
West Ash Basin
FLOW
FLOW
MW-6BR
MW 6D
CW-2
CW-2D
MW-5D
MW-5BR
CW-5
S-18
MW-1
S-19
7 CHIMNEY DRAINS S01 THRU S07
ABMW-3BRL
ABMW-3
ABMW-3BR
MW-2
S-15
WEST ASH BASIN MAIN DAM
MW-9BR
SW-3
LEGEND
DUKE ENERGY PROGRESS PARCEL LINE
PERSON COUNTY PARCEL LINE
CCR SURFACE IMPOUNDMENT COMPLIANCE BOUNDARY
CCR SURFACE IMPOUNDMENT
COMBINED COMPLIANCE BOUNDARY
NPDES TREATMENT UNIT
LINED LANDFILL LIMIT (APPROXIMATE)
ABMW-5BR
CSA MONITORING WELL (SURVEYED)
CW-1
COMPLIANCE MONITORING WELL (SURVEYED)
SW-6
SURFACE WATER & SEDIMENT SAMPLE LOCATION
S-12
SEEP SAMPLE LOCATION

Figure 1. Heated Water Discharge Canal

14. The first components of the Ash Pond Treatment System at Roxboro were constructed between 1964 and 1966 with the creation of the East Ash Basin. *See* Figures 2 and 3, *infra*. The East Ash Basin was made by constructing an earthen dam to the southeast of the main plant in a small, non-navigable channel. A man-made canal from the East Ash Basin (the "Eastern Discharge Canal") was constructed in connection with the East Ash Basin. *Id.* It provided a direct discharge of treated ash basin wastewater and secondary surface water runoff from adjacent streams to the intake canal from Hyco Reservoir. Upon information and belief, the North Carolina State Stream Sanitation Committee approved these construction activities.

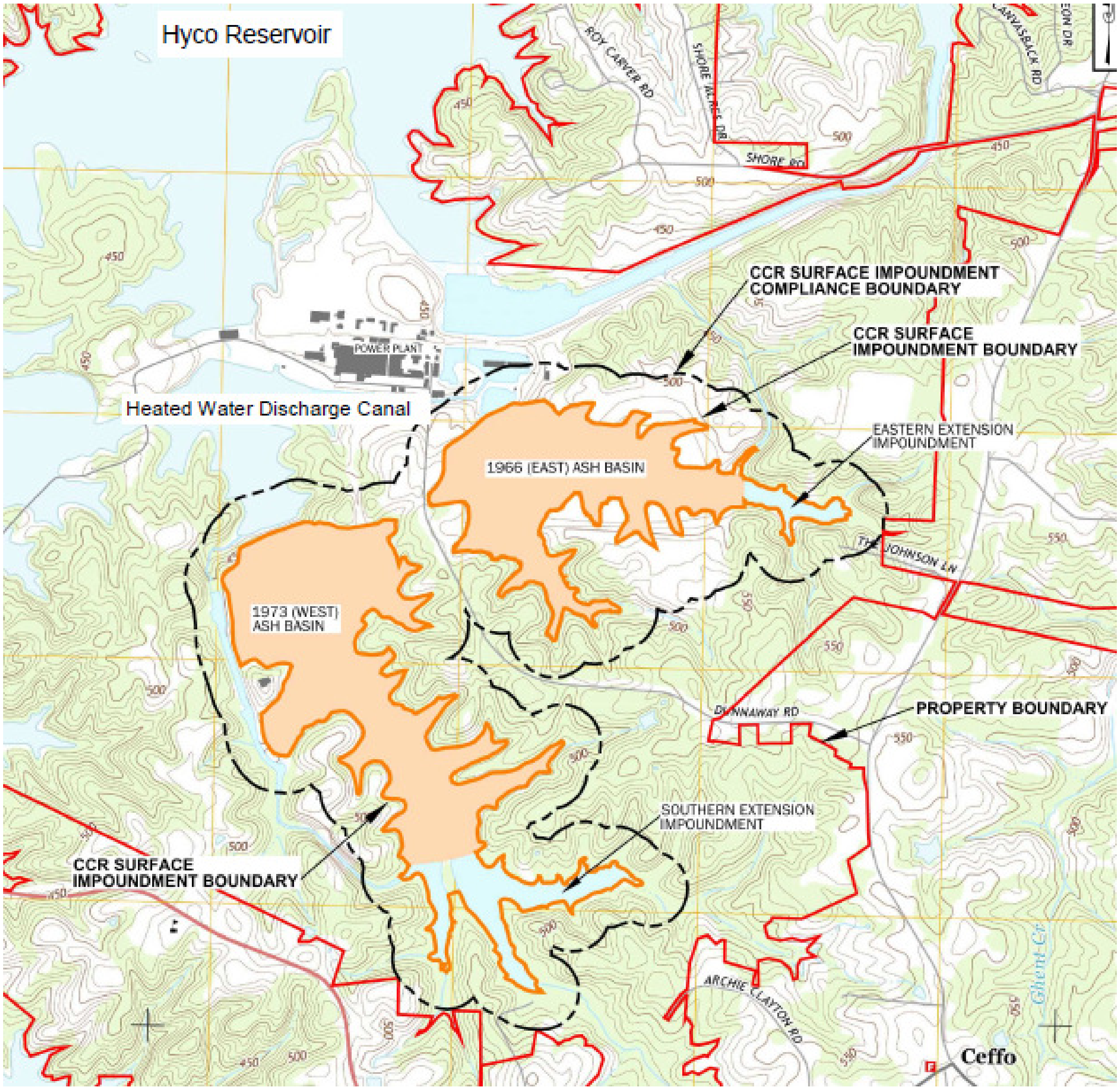

Hyco Reservoir
ROY CARVER RD
SHORE ACRES DR
SHORE RD
CANVASBACK RD
POWER PLANT
Heated Water Discharge Canal
CCR SURFACE IMPOUNDMENT
COMPLIANCE BOUNDARY
CCR SURFACE
IMPOUNDMENT BOUNDARY
EASTERN EXTENSION
IMPOUNDMENT
1966 (EAST) ASH BASIN
1973 (WEST)
ASH BASIN
THE JOHNSON LN
DUNNAWAY RD
PROPERTY BOUNDARY
SOUTHERN EXTENSION
IMPOUNDMENT
CCR SURFACE
IMPOUNDMENT BOUNDARY
ARCHIE CLAYTON RD
Ghent Cr
Ceffo

Figure 2. Roxboro Site Layout Map

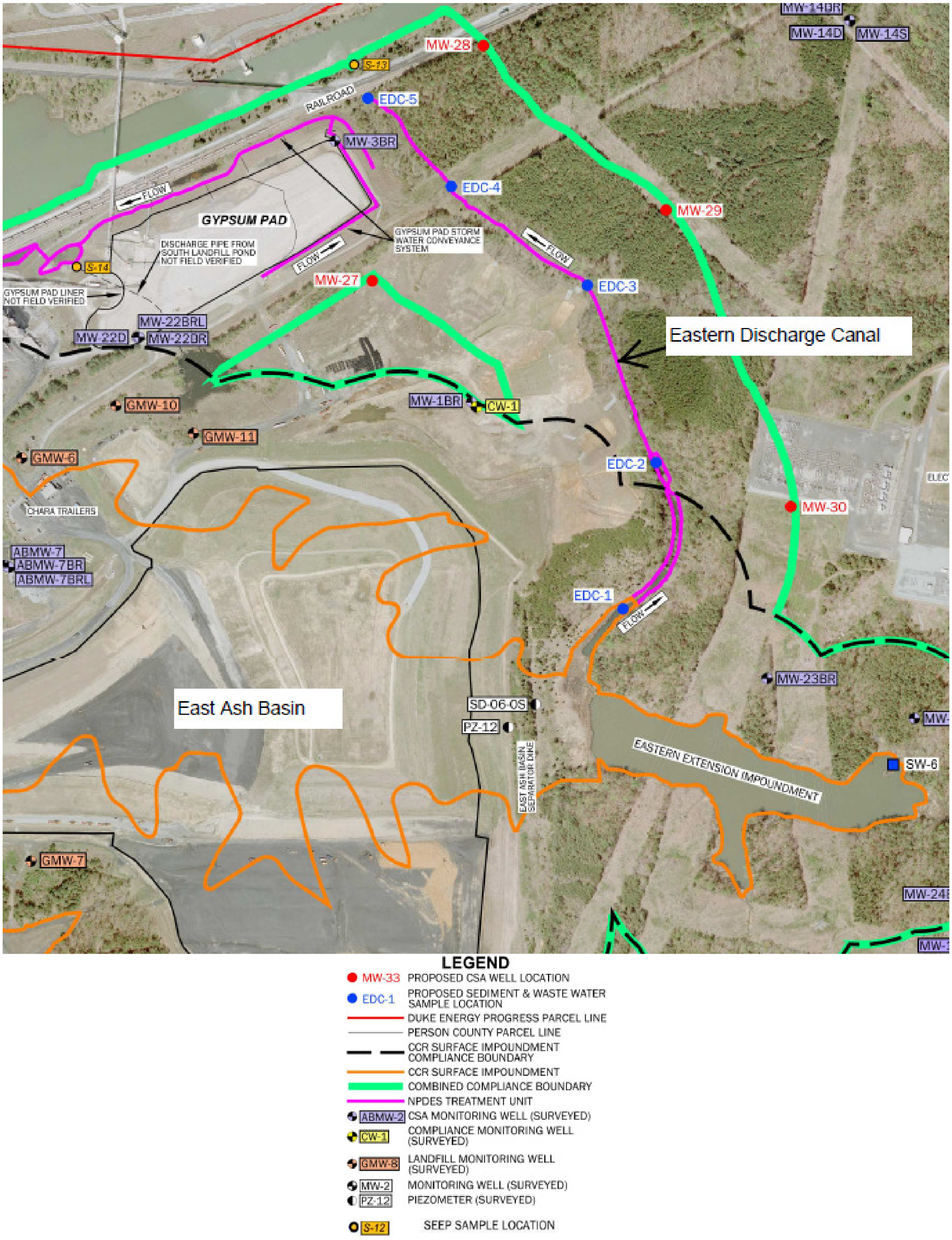

MW-14BR
MW-14D
MW-14S
MW-28
S-13
RAILROAD
EDC-5
MW-3BR
FLOW
GYPSUM PAD
EDC-4
MW-29
DISCHARGE PIPE FROM SOUTH LANDFILL POND NOT FIELD VERIFIED
GYPSUM PAD STORM WATER CONVEYANCE SYSTEM
FLOW
S-14
FLOW
MW-27
EDC-3
GYPSUM PAD LINER NOT FIELD VERIFIED
Eastern Discharge Canal
MW-22BRL
MW-22D
MW-22DR
MW-1BR
CW-1
GMW-10
GMW-11
GMW-6
EDC-2
CHARA TRAILERS
MW-30
ABMW-7
ABMW-7BR
ABMW-7BRL
EDC-1
FLOW
MW-23BR
East Ash Basin
SD-06-OS
PZ-12
EAST ASH BASIN SEPARATOR DIKE
EASTERN EXTENSION IMPOUNDMENT
SW-6
GMW-7
LEGEND
MW-33 PROPOSED CSA WELL LOCATION
EDC-1 PROPOSED SEDIMENT & WASTE WATER SAMPLE LOCATION
DUKE ENERGY PROGRESS PARCEL LINE
PERSON COUNTY PARCEL LINE
CCR SURFACE IMPOUNDMENT COMPLIANCE BOUNDARY
CCR SURFACE IMPOUNDMENT
COMBINED COMPLIANCE BOUNDARY
NPDES TREATMENT UNIT
ABMW-2 CSA MONITORING WELL (SURVEYED)
CW-1 COMPLIANCE MONITORING WELL (SURVEYED)
GMW-8 LANDFILL MONITORING WELL (SURVEYED)
MW-2 MONITORING WELL (SURVEYED)
PZ-12 PIEZOMETER (SURVEYED)
S-12 SEEP SAMPLE LOCATION

Figure 3. East Ash Basin and Eastern Discharge Canal

15. In the mid-1980s, an earthen dam (the "East Ash Basin Separator Dike") was constructed on the eastern portion of the East Ash Basin to accommodate development of an unlined dry fly ash landfill on top of the East Ash Basin. *See* Figure 4, *infra*. The East Ash Basin Separator Dike formed a barrier separating the East Ash Basin from the Eastern Discharge Canal and a portion of the East Ash Basin, creating the East Ash Basin Eastern Extension Impoundment (the "Eastern Extension Impoundment"). Upon information and belief, the State of North Carolina approved these construction activities. The Eastern Extension Impoundment remains a part of the East Ash Basin.

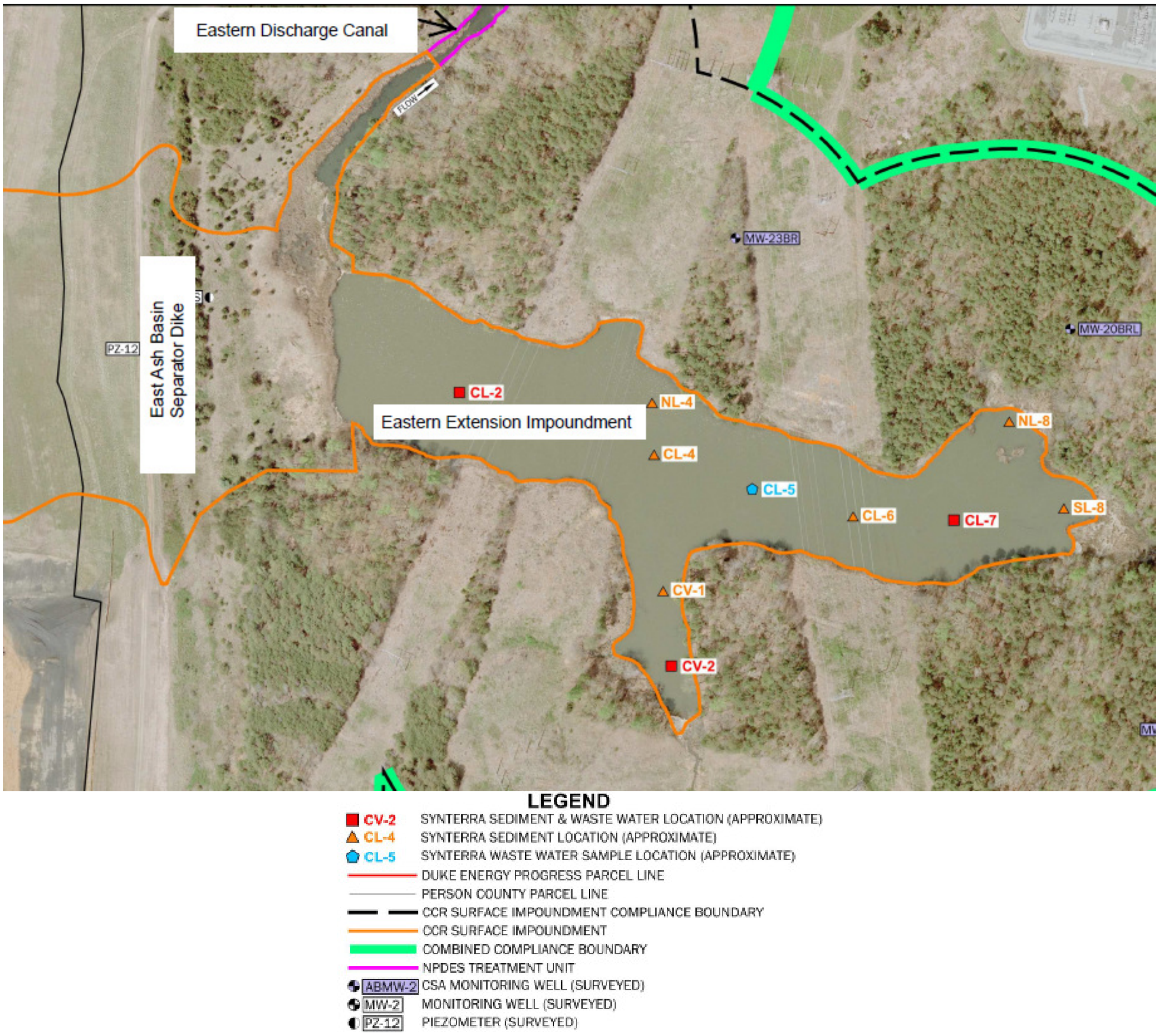

Eastern Discharge Canal
FLOW
East Ash Basin Separator Dike
PZ-12
MW-23BR
MW-20BRL
Eastern Extension Impoundment
CL-2
NL-4
CL-4
CL-5
CL-6
CL-7
NL-8
SL-8
CV-1
CV-2
LEGEND
CV-2 SYNTERRA SEDIMENT & WASTE WATER LOCATION (APPROXIMATE)
CL-4 SYNTERRA SEDIMENT LOCATION (APPROXIMATE)
CL-5 SYNTERRA WASTE WATER SAMPLE LOCATION (APPROXIMATE)
DUKE ENERGY PROGRESS PARCEL LINE
PERSON COUNTY PARCEL LINE
CCR SURFACE IMPOUNDMENT COMPLIANCE BOUNDARY
CCR SURFACE IMPOUNDMENT
COMBINED COMPLIANCE BOUNDARY
NPDES TREATMENT UNIT
ABMW-2 CSA MONITORING WELL (SURVEYED)
MW-2 MONITORING WELL (SURVEYED)
PZ-12 PIEZOMETER (SURVEYED)

Figure 4. Eastern Extension Impoundment[1]

16. The West Ash Basin began operation in 1973. The West Ash Basin was created by constructing an earthen dam in the stream channel formerly known as Sargents Creek (the "Main Dam"). *See* Figure 5, *infra*. Upon information and belief, Sargents Creek was a small, non-navigable channel at the time that it was impounded to create the West Ash Basin. In 1986, Duke Energy raised the Main Dam 13 feet and constructed a series of dikes (Dikes #1 through 4) and a discharge canal (the "Western Discharge Canal") to increase the storage capacity of the West Ash Basin and modify the circulation pattern to increase ash settling time. *Id.* Upon information and belief, the State of North Carolina approved these construction activities.

[1] Any reference in the legends of the figures contained herein to "Synterra" is to Duke Energy's consultant, Synterra, who prepared the documents used to create the figures.

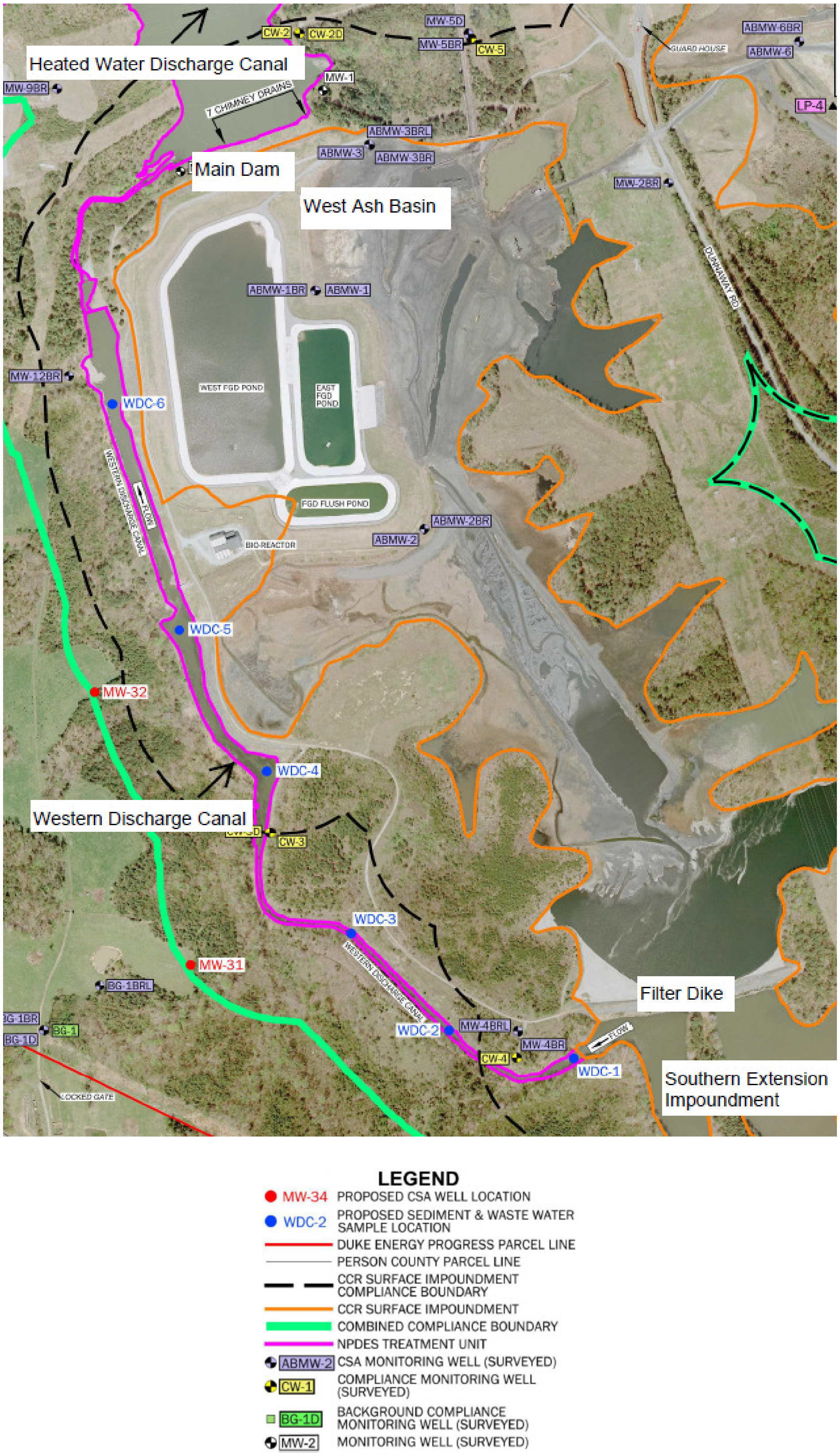

Heated Water Discharge Canal
Main Dam
West Ash Basin
Western Discharge Canal
Filter Dike
Southern Extension Impoundment
WDC-6
WDC-5
WDC-4
WDC-3
WDC-2
WDC-1
MW-32
MW-31
WEST FGD POND
EAST FGD POND
FGD FLUSH POND
BIO-REACTOR
LEGEND
MW-34 PROPOSED CSA WELL LOCATION
WDC-2 PROPOSED SEDIMENT & WASTE WATER SAMPLE LOCATION
DUKE ENERGY PROGRESS PARCEL LINE
PERSON COUNTY PARCEL LINE
CCR SURFACE IMPOUNDMENT COMPLIANCE BOUNDARY
CCR SURFACE IMPOUNDMENT
COMBINED COMPLIANCE BOUNDARY
NPDES TREATMENT UNIT
ABMW-2 CSA MONITORING WELL (SURVEYED)
CW-1 COMPLIANCE MONITORING WELL (SURVEYED)
BG-1D BACKGROUND COMPLIANCE MONITORING WELL (SURVEYED)
MW-2 MONITORING WELL (SURVEYED)

Figure 5. West Ash Basin

17. The filter dike (Dike #1) was installed in the southern end of the West Ash Basin to create a secondary settling basin and to isolate the major portion of the ash basin. *See* Figure 6, *infra*. Upon information and belief, the State of North Carolina approved these construction activities. The secondary settling basin is referred to as the West Ash Basin Southern Extension Impoundment (the "Southern Extension Impoundment"). The Southern Extension Impoundment remains a part of the West Ash Basin.

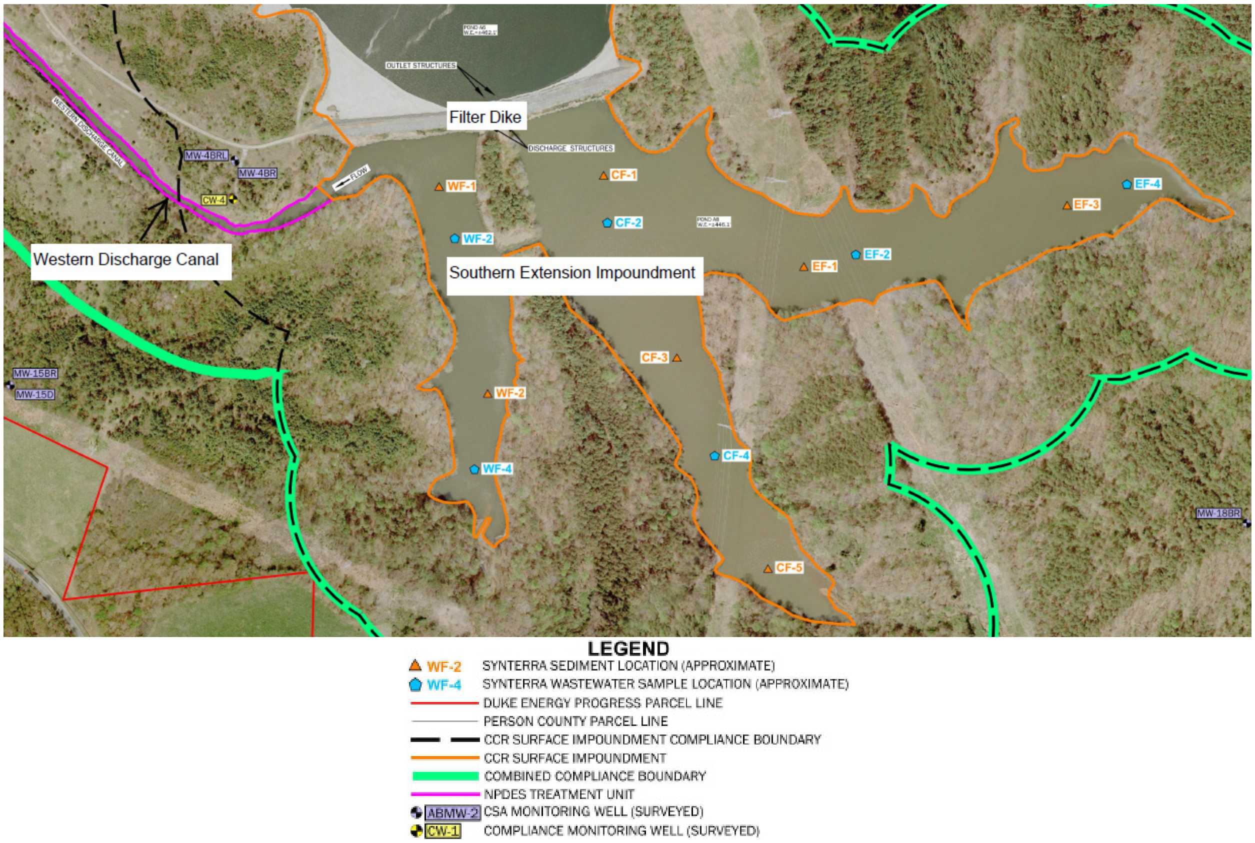

Filter Dike
Western Discharge Canal
Southern Extension Impoundment
WF-1
WF-2
WF-4
CF-1
CF-2
CF-3
CF-4
CF-5
EF-1
EF-2
EF-3
EF-4
MW-4BRL
MW-4BR
CW-4
MW-15BR
MW-15D
MW-18BR
LEGEND
WF-2 SYNTERRA SEDIMENT LOCATION (APPROXIMATE)
WF-4 SYNTERRA WASTEWATER SAMPLE LOCATION (APPROXIMATE)
DUKE ENERGY PROGRESS PARCEL LINE
PERSON COUNTY PARCEL LINE
CCR SURFACE IMPOUNDMENT COMPLIANCE BOUNDARY
CCR SURFACE IMPOUNDMENT
COMBINED COMPLIANCE BOUNDARY
NPDES TREATMENT UNIT
ABMW-2 CSA MONITORING WELL (SURVEYED)
CW-1 COMPLIANCE MONITORING WELL (SURVEYED)

Figure 6. Southern Extension Impoundment

18. Dikes #2, 3 and 4 were placed along the Western Discharge Canal on the west side of the West Ash Basin. Upon information and belief, the State of North Carolina approved these construction activities. The Western Discharge Canal was built to receive treated wastewater from various sources in the Treatment Works, and flows into the Heated Water Discharge Canal pursuant to a permit issued under the Clean Water Act.

B. The Clean Water Act and Its Section 404 and National Pollutant Discharge Elimination System ("NDPES") Permitting Programs

19. The modern Clean Water Act dates back to 1972. Its purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by regulating discharges of pollutants into "waters of the United States" and requiring states to establish and enforce quality standards for surface waters. 33 U.S.C. § 1251(a). Congress considered, but rejected, regulating groundwater in addition to surface water under the Act. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739; 118 Cong. Rec. 10669 (1972), 1 Leg. Hist. 597.

20. A central provision of the Act is its requirement that individuals, corporations, and governments secure a permit before discharging any pollutant from any point source into the navigable waters of the United States. *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1331 (2013).

21. Pursuant to the Act, "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. §1362(14).

22. "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). Under the Act, navigable waters is "a defined term, and the definition is simply 'the waters of the United States.'" *Rapanos v. United States*, 547 U.S. 715, 730-31 (2006) (quoting 33 U.S.C. § 1362(7)).

23. Section 404 of the Act, 33 U.S.C. § 1344 authorizes the Secretary of the Army, acting through the Chief of Engineers (the United States Army Corps of Engineers or the "Army

Corps of Engineers") to issue permits for discharges of pollutants that constitute "dredged" or "fill" material.

24. Section 402 of the Act, 33 U.S.C. § 1342, establishes the National Pollutant Discharge Elimination System ("NPDES") permit program, pursuant to which permits for all other types of pollutant discharges may be issued.

25. NPDES permits specify an acceptable level for each pollutant in a discharge for which the permit writer determines such a level, known as an effluent limitation, is required. Under the Act, permit holders must ensure they do not discharge pollutants in amounts greater than the effluent limits specified in their permits, and that they comply with monitoring and reporting requirements set forth in those permits.

26. The EPA administers the NPDES program for each state, but a state may apply for a transfer of permitting authority to the state. Once that authority is transferred, the state has the primary responsibility for reviewing and approving NPDES discharge permits.

27. North Carolina has been authorized to administer the NPDES program since 1975, and does so through the North Carolina Department of Environmental Quality ("DEQ"). An NPDES permit establishes the Act's requirements applicable to the covered activity for the term of the permit.

i. The Waste Treatment System Exclusion

28. An NPDES permit is not required for discharge into waste treatment systems, because waste treatment systems are excluded from the definition of "waters of the United States." Both the NPDES program rules promulgated by EPA at 40 C.F.R. 122.2, and the Section 404 program rules promulgated by the Army Corps of Engineers at 33 C.F.R. § 328.3, recognize this exclusion. As § 328.3 specifies: "The following are not 'waters of the United

States' . . . (1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act."

29. The waste treatment system exclusion was first authorized in 1979, and stated simply that "waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States." 44 Fed. Reg. 32,854, 32,901 (June 7, 1979).

30. On May 19, 1980, EPA issued a revised regulation that reiterated the waste treatment exclusion, but excepted units created in waters of the United States from the waste treatment system exclusion:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of [the Act] (other than cooling, ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. *This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.*

Final Rule, Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,424 (May 19, 1980) (emphasis added) (codified in 40 C.F.R. §122.2 (1981)).

31. On July 21, 1980, EPA suspended the May 19, 1980 exception. The reason for the suspension was, in part, to avoid classifying existing ash ponds as waters of the United States:

> Certain industry petitioners . . . objected that the language of the regulation would require them to obtain permits for discharges into existing waste treatment systems, *such as power plant ash ponds*, which had been in existence for many years. In many cases, they argued, EPA has issued permits for discharges from, not into, these systems. . . . EPA agrees that the regulation should be carefully re-examined and that it may be overly broad. . . . [T]he last sentence, beginning with "This exclusion applies . . .," is suspended until further notice.

Consolidated Permit Regulations: Suspension of portion of final rule, 45 Fed. Reg. 48,620 (July 21, 1980) (emphasis added). The suspension was continued at 48 Fed. Reg. 14,146, 14,153 (April 1, 1983). The Clean Water Rule, published at 80 Fed. Reg. 37,054, 37,114 (June 29, 2015), continues and reaffirms the indefinite stay.

32. The Army Corps of Engineers and EPA have a longstanding policy that waste treatment system units may be created in jurisdictional waters, and excluded from coverage under the Act. *See* Memorandum from LaJuana S. Wilcher, Assistant Administrator for the EPA, to Charles E. Findley, Director, Water Division, Region X, United States Army Corps of Engineers, on Clean Water Act Regulation of Mine Tailings Disposal (Oct. 2, 1992), attached as Exhibit B hereto; *Ohio Valley Envt'l Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009).

33. The Army Corps of Engineers and EPA recently confirmed that these interpretations are still in place. In the Clean Water Rule Response to Comments – Topic 7: Features and Waters Not Jurisdictional, the Army Corps of Engineers and EPA stated that "[t]he Clean Water Rule makes no changes to the waste treatment system exclusion. The definition of 'waters of the United States' has excluded waste treatment systems since 1979, and only ministerial changes are made in the proposed and final rules; it remains substantively and operationally unchanged." *See* EPA, Clean Water Rule Response to Comments – Topic 7: Features and Waters Not Jurisdictional, available at https://www.epa.gov/cleanwaterrule/response-comments-clean-water-rule-definition-waters-united-states, at 51 (EPA's and the Army Corps of Engineers' response to public comments received on proposed rule 79 Fed. Reg. 22188 (Apr. 21, 2014)).

34. EPA and the Army Corps of Engineers recently acknowledged that waste treatment systems built in a water of the United States that have obtained both a Section 404 permit for construction and a Section 402 permit for discharges from the unit are lawful. Preamble to the Clean Water Rule, 80 Fed. Reg. at 37,097.

35. As stated in 33 C.F.R. § 330.3, activities are covered by a nationwide permit and no further Section 404 permitting is required if the activities took place before the "phase-in" date which extended Section 404 jurisdiction to all waters of the United States. The "phase-in" dates were: after July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States, including wetlands. *Id.*; *see also* Letter from Department of the Army to Steve Cahoon, dated December 7, 2015, attached as Exhibit C ("Based upon the time that impacts to jurisdictional aquatic resources occurred during the construction of Duke Energy's coal ash treatment / disposal basins in Asheville, the activity was authorized by the Section 404 permitting regulations and guidelines in effect at the time. *The same analysis is applicable to the ash basins in other parts of the State*.") (emphasis added).

ii. The Act Does Not Apply to Pollution of Groundwater

36. Just as the Act does not apply to discharges made into a waste treatment system, neither is an NPDES permit required for the pollution of groundwater. Groundwater is beyond the federal regulatory jurisdiction provided by the Act. *See Rapanos v. United States*, 547 U.S. 715, 734 (2006) ("The plain language of the Act simply does not authorize [a] 'Land is Waters' approach to federal jurisdiction.").

37. The legislative history of the Act makes clear that Congress intended to leave the establishment of standards and controls for groundwater pollution to the states. The report of the Senate Committee on Public Works that accompanied the 1972 Act amendments to the Senate explains that the Committee rejected several bills that would provide authority to establish federally approved standards for groundwater in the Act "[b]ecause the jurisdiction regarding groundwaters is so complex and varied from State to State." *See* S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739. Instead, the authority to regulate groundwater was left to the States. *Id.* The House Committee on Public Works also rejected a proposed amendment, by a vote of 86 to 34, to add federal standards and controls over groundwater pollution to the Act. 118 Cong. Rec. 10669 (1972), 1 Leg. Hist. 597.

38. The Army Corps of Engineers and EPA recently confirmed that groundwater is not regulated by the Act. In their summary of the definition of "waters of the United States" in the Preamble to the Clean Water Rule, the agencies state that "the rule excludes for the first time certain waters and features over which the agencies have generally not asserted Clean Water Act jurisdiction, *as well as groundwater, which the agencies have never interpreted to be a 'water of the United States' under the [Act].*" 80 Fed. Reg. at 37,073 (emphasis added).

C. Roxboro's Permitting History

39. Prior to the creation of the NPDES and Section 404 permitting programs under the Act, activities at Roxboro were authorized by Permit No. 522 and No. 2523, issued by the North Carolina Stream Sanitation Committee and the North Carolina Board of Air and Water Resources.

40. Pursuant to 33 C.F.R. § 330.3, the construction of the East Ash Basin (including the Eastern Extension Impoundment created as part of that basin and the Eastern Discharge Canal constructed in connection with that basin), the West Ash Basin (including the Southern

Extension Impoundment created as part of that basin), and the Heated Water Discharge Canal are covered by a nationwide permit and do not require further permitting under Section 404, since they were each constructed before the phase-in dates which extended Section 404 jurisdiction to all waters of the United States.

41. On June 30, 1981, DEQ's predecessor agency, the Department of Environment and Natural Resources ("DENR"), issued NPDES Permit No. NC0003425 for Roxboro (the "Roxboro NPDES Permit"). The Roxboro NPDES Permit was renewed subsequently, on July 10, 1986 and March 13, 1987.

42. These prior versions of the Roxboro NPDES Permit recognized the Roxboro waste treatment system as it existed at the time.

43. On January 30, 1991, a predecessor of Duke Energy submitted an application for renewal that requested removal of Outfall 001 from the Roxboro NPDES Permit because the East Ash Basin was no longer receiving sluiced ash, and thus, there was no wastewater discharge via Outfall 001. The State agreed and issued a new Roxboro NPDES Permit, effective June 1, 1994, that did not include Outfall 001 but that nevertheless acknowledged the existence of the waste treatment system. The Roxboro NPDES Permit was renewed again on March 1, 1998 and February 1, 2003, without material change to the description of the waste treatment system.

44. A major modification of the Roxboro NPDES Permit was issued effective September 1, 2005. The modification was to include the FGD wastewater treatment system and discharge in the permit.

45. The current Roxboro NPDES Permit was renewed on May 1, 2007, with an expiration date of March 31, 2012. *See* Roxboro NPDES Permit, attached as Exhibit D hereto. The waste treatment system at Roxboro under the current Roxboro NPDES Permit consists of the

Ash Pond Treatment System (Internal Outfall 002), the Heated Water Discharge Canal System (Outfall 003), the Cooling Tower Blowdown System (Internal Outfall 005), the Coal Pile Runoff Treatment System (Outfall 006), the Domestic Wastewater Treatment System (Internal Outfall 008), the Chemical Metal Cleaning Treatment System (Internal Outfall 009), and the Flue Gas Desulfurization Treatment System (Internal Outfall 010) (collectively, the "Treatment Works"). *See id.* at 2.

46. Applicable federal NPDES permit regulations allow permit writers to impose limits on "internal waste streams," that apply prior to the point of discharge to a water of the United States, where certain conditions are met. *See* 40 C.F.R. § 122.45(h). The designation of an outfall as "internal" therefore reflects the permit writer's determination that the treated waste water monitored at that point has not yet reached waters of the United States.

47. On September 28, 2011, Duke Energy's predecessor Progress Energy submitted an application for renewal of the Roxboro NPDES Permit to DENR. Because Progress Energy timely applied for re-issuance 180 days prior to the expiration date, pursuant to N.C. Gen. Stat. § 150B-3, Duke Energy continues to operate the Roxboro plant under the administratively extended Roxboro NPDES Permit.

48. Since September 28, 2011, Duke Energy has submitted to DENR (and, subsequently, DEQ) multiple updates to the renewal application, dated July 27, 2011, March 31, 2012, October 15, 2014, December 17, 2014, July 22, 2015, July 5, 2016, and August 17, 2016. The October 15, 2014 submittal identified all known seeps for inclusion in the Roxboro NPDES Permit. The August 17, 2016 submittal included requests from Duke Energy for modifications to the internal wastewater process flow, including the re-insertion of NPDES Outfall 001, which is the discharge point for flow from the Eastern Discharge Canal to the intake canal.

49. A draft Roxboro NPDES Permit was issued for Roxboro on January 21, 2017 that re-inserts NPDES Outfall 001 in order to capture the flow from seeps identified near the East Ash Basin. A final Roxboro NPDES Permit has not yet been issued. Until such time as the final permit is issued, Duke Energy continues to operate under the 2007 Roxboro NPDES Permit (Ex. D).

D. Current Operations of Roxboro's Wastewater Treatment System

50. The Ash Pond Treatment System is a component of the overall waste treatment system at Roxboro.

51. The Ash Pond Treatment System currently consists of the East Ash Basin (with its Eastern Extension Impoundment), the Eastern Discharge Canal, the West Ash Basin (with its Southern Extension Impoundment), and the Western Discharge Canal. With the exception of treated coal pile runoff, which is treated separately and discharged via Outfall 006, Roxboro's various wastewaters are internally routed into the Ash Pond Treatment System. The Ash Pond Treatment System then treats the wastewaters to remove coal ash through settling and discharging the resulting effluent to the Heated Water Discharge Canal. The wastewaters are ultimately discharged from the Heated Water Discharge Canal into Hyco Reservoir through NPDES Outfall 003.

52. The ash basins are designed and permitted to remove solid coal ash from the wastewater in the basin. The ash basins are not designed to remove dissolved materials from the wastewater. The concentration of dissolved materials and total suspended solids ("TSS") in the wastewater discharged by Roxboro is regulated by the Roxboro NPDES Permit. Duke Energy does not discharge to waters of the United States the coal ash removed in the course of wastewater treatment in the basins.

53. The East Ash Basin, constructed prior to the passage of the Act, was used until 1985 to treat wastewater. An impermeable cap was placed over the majority of the footprint of this unit in 2004. The southeastern portion of this area continues to be used as a dry landfill for fly ash generated at the plant. The placement of the cap (which also forms the fly ash landfill liner) over the former ash basin effectively reduced the continued inflow of surface infiltration within its footprint.

54. The Eastern Discharge Canal, built in connection with the East Ash Basin, provided direct discharge of ash basin wastewater and secondary surface water runoff from adjacent streams to the intake canal from Hyco Reservoir via NPDES Outfall 001. In 1994, DEQ no longer required discharge from the Eastern Discharge Canal to be monitored under NPDES regulations because Duke Energy was no longer sluicing ash to the East Ash Basin, and there was no longer a wastewater discharge from the East Ash Basin to Outfall 001. Accordingly, the outfall was removed from the Roxboro NPDES Permit. Duke Energy recently identified seeps that flow into the Eastern Discharge Canal and subsequently to the intake canal. Duke Energy has requested in its renewal application that Outfall 001 be included in the Roxboro NPDES Permit to cover this flow.

55. The Eastern Extension Impoundment is a part of the East Ash Basin. On October 17, 2011, the Army Corps of Engineers issued a jurisdictional determination that the Eastern Extension Impoundment is not jurisdictional under Section 404 of the Act. *See* Exhibit E. A small amount of groundwater seepage from beneath the East Ash Basin Separator Dike on the east side of the closed East Ash Basin, and surface water runoff from offsite areas to the east, also inflow into the Eastern Extension Impoundment. This water ultimately accumulates and flows via the Eastern Discharge Canal into the main intake canal for the plant, where it is

recycled back into the plant as cooling or process water. Any residue from this water intake flows to the Heated Water Discharge Canal.

56. The West Ash Basin receives a flow of wet bottom ash slurry from the plant. Storm water runoff and leachate collected at the former East Ash Basin landfill are also discharged into this unit. The other sources of water entering the basin are rainfall and, to a much lesser extent, shallow groundwater that is flowing into the former valley feature from surrounding higher ground. After the bottom ash settles along the entrance channel to the ash basin, it is collected, sorted by size, and recycled as aggregate material or structural fill. The water entering the unit with the ash (or as rainfall) accumulates in a surface impoundment along its south end, where additional treatment, by settling of solids, occurs. The treated water then discharges through a rock filter dam into the Western Discharge Canal. A small quantity of subsurface water in the ash on the north end of the basin also discharges to the north through the foundation of the earthen dam and forms seeps along the downstream toe of the dam, which flow via concrete-lined channels into the Heated Water Discharge Canal.

57. The Western Discharge Canal is part of the permitted Ash Pond Treatment System. The Western Discharge Canal receives waste streams from various sources in the Treatment Works including: West Ash Basin effluent, landfill drainage and runoff from the East Ash Basin lined landfill, storm water runoff from the two ash basins, wastewater discharge from the Flue Gas Desulfurization Pond wastewater treatment process, cooling tower blowdown, domestic sewage treatment plant discharge, and surface water runoff. Effluent from the Western Discharge Canal passes through NPDES Internal Outfall 002 and flows into the Heated Water Discharge Canal, and ultimately discharges into Hyco Reservoir through NPDES Outfall 003.

58. The Southern Extension Impoundment is a part of the West Ash Basin located south of the filter dike of the West Ash Basin.

59. The Heated Water Discharge Canal is identified in the Roxboro NPDES Permit as the final unit of the plant's waste water treatment system before the water is discharged to Hyco Reservoir via Outfall 003.

60. Under the current Roxboro NPDES Permit, the ash basins (including the Eastern Extension Impoundment and the Southern Extension Impoundment), the Eastern Discharge Canal, the Western Discharge Canal, and the Heated Water Discharge Canal are all part of the wastewater treatment system and are subject to the waste treatment system exclusion. Accordingly, the ash basins (including the Eastern Extension Impoundment and the Southern Extension Impoundment), the Eastern Discharge Canal, the Western Discharge Canal, and the Heated Water Discharge Canal are not "waters of the United States" subject to regulation under the Act.

61. An NPDES permit is not required to discharge wastewater into the ash basins (including the Eastern Extension Impoundment and the Southern Extension Impoundment), the Eastern Discharge Canal, the Western Discharge Canal, or the Heated Water Discharge Canal.

62. Directing wastewater into Treatment Works covered by an NPDES permit does not create liability under the Act.

E. The Roxboro State Enforcement Action

63. On August 16, 2013, DENR filed a state enforcement action against Duke Energy in the Superior Court of Wake County. *See* Complaint attached as Exhibit F ("Roxboro State Complaint"). The Roxboro State Complaint alleges violations of state environmental laws at six Duke Energy facilities, including Roxboro. *Id.* at ¶¶ 42-195 (¶¶ 66-91 specifically addressing Roxboro).

64. Among the violations alleged are unpermitted releases to surface waters ("seeps") at Roxboro. *Id.* at ¶¶ 86-87. Moreover, the complaint states: "A seep or discharge from the Ash Pond…that is not included in the…Permit is an unpermitted discharge in violation of N.C. Gen. Stat. § 143-215.1(a)(1) and (a)(6)." *Id.* at ¶ 88.

65. The draft Roxboro NPDES Permit includes four additional outfalls that are not in the current Roxboro NPDES Permit. These include Outfall 001, and Internal Outfalls 012A, 012B, and 012C which will flow into the Western Discharge Canal. Outfall 001 will cover flow from stormwater and four seeps that originate near the ash landfill and flow to the intake canal through a common outfall. The flow that will be covered by Outfall 001 does not constitute a "discharge" under the Act, because seeps from coal ash ponds or landfills and stormwater are not discharges from point sources. *See* 33 U.S.C. §1362(12).

66. Proposed NPDES Outfall 001 was included in the Roxboro NPDES Permit as a permitted discharge from a point source until 1994. Once the draft Roxboro NPDES Permit becomes final, any discharge from Outfall 001 will be permitted. Any unpermitted discharge currently associated with Outfall 001 is subsumed within the allegations of the Roxboro State Complaint.

67. In the Roxboro State Complaint, DEQ seeks to abate all unauthorized discharges at Roxboro. *Id.* at Prayer for Relief.

68. In October 2014, the state court allowed RRBA to intervene in the Roxboro State Enforcement Action, with full rights of participation as a party with respect to Roxboro. *See* Roxboro Stipulation Regarding RRBA's Motion to Intervene, attached as Exhibit G.

69. DEQ has diligently prosecuted its claims with respect to Roxboro. During the discovery period, DEQ served multiple sets of written discovery on Duke Energy and participated in all depositions of Duke Energy witnesses. Discovery has now closed.

F. RRBA's Notice

70. Despite the progress of the Roxboro State Enforcement Action, RRBA served its Notice on March 13, 2017, threatening additional action.

71. In the Notice, RRBA alleges three claims against Duke Energy: (1) unauthorized surface discharges to Waters of the United States (the "Waste Treatment System Claims"), (2) unauthorized discharges to State Waters and Navigable Waters in violation of Duke Energy's NPDES permit (the "Permit Claims"), and (3) illegal discharges through close hydrologic flow into Waters of the United States (the "Hydrological Connection Claim"). *See* Ex. A at 13-33. RRBA also alleged that these claims were not being diligently prosecuted by DEQ in the Roxboro State Enforcement Action.

i. RRBA's First Allegation (the "Waste Treatment System Claims")

72. RRBA's first allegation is premised on RRBA's mistaken belief that Duke Energy is treating jurisdictional waters as part of its wastewater treatment system at Roxboro.

73. First, RRBA alleges that the Heated Water Discharge Canal is part of Hyco Reservoir, which is a water of the United States, and cannot be used as part of a wastewater treatment system. *Id.* at 15-18. RRBA alleges that any discharges to the Heated Water Discharge Canal are thus unpermitted discharges to a water of the United States. *Id.*

74. Second, RRBA alleges that Duke Energy is treating Sargents Creek, which RRBA contends is a water of the United States, as part of its wastewater treatment system and is making unauthorized discharges into Sargents Creek. *Id.* at 19-22. What RRBA describes as "Sargents Creek" is the Southern Extension Impoundment of the West Ash Basin, the Western Discharge

Canal, and the former stream channel north of the West Ash Basin that is now part of the Heated Water Discharge Canal. *Id.* at 20. These areas are part of the Roxboro Treatment Works.

75. Third, RRBA alleges that Duke Energy is making unpermitted discharges to the Eastern Discharge Canal, which RRBA also claims is a water of the United States. *Id.* at 22-24.

76. Finally, because RRBA believes that the Western Discharge Canal, Heated Water Discharge Canal, and Eastern Discharge Canal at Roxboro are in fact jurisdictional waters, it alleges that Duke Energy's Roxboro NPDES Permit is not valid, and that the permitted internal outfalls are unpermitted discharges to waters of the United States. *Id.* at 24-26.

ii. RRBA's Second Allegation (the "Permit Claims")

77. RRBA's second allegation is that Duke Energy is violating provisions of the applicable Roxboro NPDES Permit.

78. For example, RRBA contends that Duke Energy is violating the Roxboro NPDES Permit's "removed substances" provision by making "unauthorized discharges of solids, sludges, and pollutants" that have been "removed" from wastewater, via the Roxboro Ash Pond Treatment System. *Id.* at 26-29. RRBA alleges that the Ash Pond Treatment System discharges removed substances directly to groundwater, which then flows to adjacent surface water bodies.

79. RRBA also contends that Duke Energy is violating the Roxboro NPDES Permit's provisions requiring proper operation and maintenance of the wastewater facility and systems. *Id.* at 29.

iii. RRBA's Third Allegation (the "Hydrological Connection Claim")

80. RRBA's third allegation is that Duke Energy is making illegal discharges to waters of the United States, including the Heated Water Discharge Canal, the West Ash Basin's Southern Extension Impoundment, the Western Discharge Canal, the East Ash Basin's Eastern Extension Impoundment, and the Eastern Discharge Canal, via hydrologically connected

groundwater. *Id.* at 29-33. RRBA further claims that the discharges are unpermitted point source discharges to navigable waters of the United States. *Id.*

81. By notifying Duke Energy of RRBA's intent to bring an action against Duke Energy regarding its Roxboro plant, RRBA is attempting to impose an unlawful interpretation of the Clean Water Act and its rules and regulations on Duke Energy and attempting to regulate and control the Roxboro plant in a manner inconsistent with the Act and the Roxboro NPDES Permit.

V. CLAIMS FOR RELIEF

COUNT ONE:
Declaratory Judgment That the Roxboro Treatment Works are Not "Waters of the United States"

82. Plaintiff re-alleges and incorporates by reference the allegations in Paragraphs 1 through 81 of the Complaint as if fully set forth herein.

83. The Roxboro East Ash Basin began operating in 1966, and the West Ash Basin began operating in 1973. These basins (which include the Eastern Extension Impoundment and the Southern Extension Impoundment, respectively), the Eastern Discharge Canal, the Western Discharge Canal, and the Heated Water Discharge Canal, are components of the Treatment Works at Roxboro under the current Roxboro NPDES Permit. The Treatment Works was constructed by Duke Energy in order to comply with the requirements of the Clean Water Act.

84. The components of the current Treatment Works, including the West Ash Basin (and its Southern Extension Impoundment), the East Ash Basin (and its Eastern Extension Impoundment), the Eastern Discharge Canal, the Western Discharge Canal, and the Heated Water Discharge Canal, are not—and never have been—"waters of the United States" subject to regulation under the Clean Water Act.

85. The Treatment Works at Roxboro are subject to the waste treatment system exclusion and are therefore excluded from the definition of "waters of the United States."

86. Discharging into the Treatment Works therefore does not require an NPDES permit and does not violate the Clean Water Act, as the State of North Carolina has repeatedly confirmed in its renewals of the Roxboro NPDES Permit.

87. Duke Energy is not making unauthorized discharges from Roxboro to waters of the United States, as alleged by RRBA.

88. Defendant asserts that the Treatment Works created by Plaintiff are "waters of the United States" and cannot receive waters carrying any pollutant. In other words, Defendant asserts that the Treatment Works cannot operate as Treatment Works—the very purpose for which they were designed, constructed, and permitted by DEQ.

89. A real, justiciable controversy exists between Plaintiff and Defendant over whether the Treatment Works at Roxboro are "waters of the United States" subject to NPDES permitting.

90. A declaratory judgment will advance the purposes of the Declaratory Judgment Act by settling the real and concrete controversy over the status of the Treatment Works and whether Duke Energy's use of the Treatment Works as Treatment Works violates the Act.

COUNT TWO:
Declaratory Judgment That the
Clean Water Act Does Not Regulate Discharges to Groundwater

91. Plaintiff re-alleges and incorporates by reference the allegations in Paragraphs 1 through 90 of the Complaint as if fully set forth herein.

92. The Act does not regulate discharges to groundwater. This includes groundwater that may have a hydrological connection to navigable surface waters. *See Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014), *amended*, No. 7:13-CV-200-FL, 2014 WL 10991530 (E.D.N.C. Aug. 1, 2014) ("Congress did not intend for [the Act] to extend federal regulatory authority over groundwater, regardless of whether that

groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters."). Accordingly, a NPDES permit is not required for discharges to groundwater, even groundwater that may have a hydrological connection to surface waters regulated by the Act.

93. Instead, regulation of groundwater quality is within the exclusive jurisdiction of the states. For example, North Carolina regulates groundwater quality under 15A North Carolina Administrative Code Subchapter 2L ("the 2L program"). Similarly, Virginia regulates groundwater quality under the Groundwater Management Act of 1992, VA. CODE ANN. §§ 62.1-254 to 62.1-270 (West 2017), and the State Water Control Law, VA. CODE ANN. §§ 62.1-44.2 to 62.1-44.34:28 (West 2017).

94. RRBA asserts in its Notice that the Act does regulate discharges to groundwater, where that groundwater has a hydrological connection to navigable surface waters within the jurisdiction of the Act. On that basis, RRBA asserts that Roxboro is violating the Act as a result of percolation to groundwater by constituents from ash stored in the East Ash Basin and West Ash Basin. Duke Energy denies these assertions.

95. A real, justiciable controversy exists between Plaintiff and Defendant over whether the Act creates federal regulatory jurisdiction over discharges to groundwater.

96. A declaratory judgment will advance the purposes of the Declaratory Judgment Act by settling the real and concrete controversy over whether the Act creates federal regulatory jurisdiction over discharges to groundwater.

COUNT THREE:
Declaratory Judgment that Roxboro's Ash Basins Do Not Constitute Unpermitted Point Sources for Discharge to Groundwater

97. Plaintiff re-alleges and incorporates by reference the allegations in Paragraphs 1 through 96 of the Complaint as if fully set forth herein.

98. The Act prohibits discharge of pollutants from a point source into waters of the United States without an NPDES permit. The Act does not prohibit pollution from "non-point" sources of pollution. The Act defines a "point source" as a "defined and discrete conveyance . . . from which pollutants may be discharged." The examples of "point source" provided in the Act "evoke images of physical structures that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993).

99. "Non-point" source pollution, on the other hand, "does not result from a discharge at a specific, single location (such as a single pipe), but generally results from land runoff, precipitation, atmospheric deposition, or percolation." EPA Office of Water, *Nonpoint Source Guidance* 3 (1987). "Discharge from migrations of groundwater … is not point source pollution, … but nonpoint source pollution …. There is no basis for a citizen suit for nonpoint source discharges under [the Act]." *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 622 (D. Md. 2011).

100. The ash basins are large, multi-acre portions of the overall Site at Roxboro. Constituents from the ash stored in these basins enters groundwater as a result of groundwater and precipitation percolating through the ash.

101. The ash basins do not represent "point sources" for discharge to groundwater under the Act. Rather, they represent "non-point" sources of constituents picked up by precipitation and migrating groundwater. As such, the Act does not require separate permitting for discharges from the Roxboro ash basins to groundwater.

102. Alternatively, even if the ash basins were found to be "point sources" for the discharge of pollutants to groundwater, the applicable Roxboro NPDES Permit allows such

discharges. Duke Energy disclosed to DEQ in the permitting process how the ash basins operate, and how constituents in the ash migrate into groundwater. In issuing the applicable permits, DEQ chose to put no limits on this migration, other than requiring compliance with certain groundwater quality standards at a specified distance from the basins' boundaries. The permit shield therefore defeats RRBA's assertions of non-compliance with the Act, even if the ash basins could qualify as "point sources" of groundwater pollution.

103. RRBA's Notice asserts that the Roxboro ash basins constitute point sources for the discharge of pollutants to groundwater, and that such discharges are not covered by the current Roxboro NPDES Permit. Duke Energy denies these assertions.

104. A real, justiciable controversy exists between Plaintiff and Defendant over whether Roxboro's ash basins constitute unpermitted point sources for discharge to groundwater.

105. A declaratory judgment will advance the purposes of the Declaratory Judgment Act by settling the real and concrete controversy over whether Roxboro's ash basins constitute unpermitted point sources for discharge to groundwater.

COUNT FOUR:
Declaratory Judgment That the Migration of Constituents From Roxboro's Ash Basins Into Groundwater Does Not Violate the Act

106. Plaintiff re-alleges and incorporates by reference the allegations in Paragraphs 1 through 105 of the Complaint as if fully set forth herein.

107. Any groundwater on the Roxboro site that picks up constituents from the ash stored in Roxboro's basins flows into surface waters contained entirely on site property: the Heated Water Discharge Canal, the Western Discharge Canal, and the Eastern Discharge Canal.

108. RRBA asserts that the flow of migrating groundwater into the Heated Water Discharge Canal, the Western Discharge Canal, and the Eastern Discharge Canal, after that

groundwater has picked up any constituent by passing through the ash basins, violates the Act. Duke Energy denies that assertion.

109. Even if these water bodies were "waters of the United States" subject to regulation under the Act, which Duke Energy denies, the Act does not prohibit the migration of pollutants into such bodies by means of hydrologically connected groundwater.

110. A real, justiciable controversy exists between Plaintiff and Defendant over whether the percolation of constituents from Roxboro's ash basins into groundwater that is hydrologically connected to the Heated Water Discharge Canal, the Western Discharge Canal, or the Eastern Discharge Canal, violates the Act.

111. A declaratory judgment will advance the purposes of the Declaratory Judgment Act by settling the real and concrete controversy over whether the percolation of constituents from Roxboro's ash basins into groundwater that is hydrologically connected to the Heated Water Discharge Canal, the Western Discharge Canal, or the Eastern Discharge Canal, violates the Act.

COUNT FIVE:
Declaratory Judgment that Roxboro is in compliance with the Roxboro NPDES Permit

112. Plaintiff re-alleges and incorporates by reference the allegations in Paragraphs 1 through 111 of the Complaint as if fully set forth herein.

113. RRBA asserts that Roxboro is not in compliance with the terms of the Roxboro NPDES Permit. For example, RRBA asserts that Roxboro is violating Section II.C.6 of the Roxboro NPDES Permit, which provides that "[s]olids, sludges, filter backwash, or other pollutants removed *in the course of treatment or control of wastewaters* shall be *utilized/disposed of* ... in a manner such as to prevent any pollutant from such materials from entering waters of the State or navigable waters of the United States." Ex. D at 24 (Part II at 8 of

16) (emphases added). This language, which DEQ for years has included as standard in its NPDES permits, is referred to as the "Removed Substances Provision."

114. The Removed Substances Provision is designed to ensure that pollutants, once removed from wastewater, are "disposed of" in accordance with the law; it is not a *per se* prohibition against discharges (or "disposal") of pollutants from waste treatment facilities or anywhere else. Consistent with its plain language, the Removed Substances Provision prohibits a permit holder from removing materials from the treatment facilities and then using or disposing of them at another location in a manner that allows pollutants to enter the waters of the State or navigable waters of the United States.

115. RRBA asserts Section II.C.6 prohibits Duke Energy from allowing the coal ash ponds to discharge "coal ash contaminants removed in the course of treatment" into the waters of the State and navigable waters of the United States. Ex. A at 27 ("[The removed substances] provision requires the permittee to prevent coal ash contaminants removed in the course of treatment … from entering the waters of North Carolina and navigable waters of the United States.").

116. RRBA's novel interpretation of the Removed Substances Provision is incorrect, contrary to the intent of the Act, and contrary to DEQ's intent is authoring the NPDES permit. For example, RRBA's interpretation cannot be squared with the plain language of Section II.C.6, with the many provisions of the permit that expressly allow discharges of pollutants from the coal ash ponds, with the Act's "permit shield," with North Carolina's groundwater standards, with the compliance boundary that surrounds the ash ponds at Roxboro, or with DEQ's knowledge of the discharges at Roxboro.

117. For example, Section A.(1) of the Roxboro NPDES Permit—among other provisions—expressly allows for the discharge of certain pollutants from the coal ash ponds. Ex. D at 5. Likewise, in Roxboro's Groundwater Monitoring Plan, Duke Energy is required to "conduct groundwater monitoring as may be required to determine the compliance of this NPDES permitted facility with the current groundwater Standards found under 15A NCAC 2L .0200." *See* Exhibit H at 1. Those standards allow the discharge of pollutants into the groundwater up to a certain level. *See* 15A N.C. Admin. Code 2L .0202(a) ("The groundwater quality standards ... are the maximum allowable concentrations resulting from any discharge of contaminants to the land or waters of the state, which may be tolerated without creating a threat to human health or which would otherwise render the groundwater unsuitable for its intended best usage.") (emphasis added). Moreover, North Carolina's groundwater regulations allow for discharges of pollutants inside Roxboro's compliance boundary, where the coal ash ponds are located. *Id.* at .0102(3), .0107. In issuing the Roxboro NPDES Permit and based upon its review of Duke Energy's application, DENR knew that coal ash ponds discharged pollutants, but has never suggested that any of these discharges violate Section II.C.6 of the Roxboro NPDES Permit.

118. As set forth above, Section II.C.6 regulates the disposal or reuse of materials like sewage sludge that are byproducts of a wastewater treatment process. It applies to materials that have been removed "in the course of treatment" and then "utilized" or "disposed of" in some manner. Ex. D at 24 (Part II at 8 of 16). The substances that have been removed in the course of treatment of wastewater provided by the basins have not been "utilized" or "disposed of" in any manner. Ex. A at 27 ("Pollutants that have been removed in the course of treatment are stored in the Roxboro coal ash basins.").

119. The ash basins do not remove pollutants from the wastewater in the course of treatment. The only substance that is removed from the wastewater during treatment in the ash basins is the solid coal ash, which settles to the bottom of the ash basins. Duke Energy does not discharge solid coal ash from the basins.

120. Duke Energy has not violated the Removed Substances Provision of the Roxboro NPDES Permit as alleged by RRBA.

121. RRBA also asserts additional violations of the Roxboro NPDES Permit's terms and conditions. *See id.* at 29 (asserting violations of the Roxboro NPDES Permit's requirements to properly operate and maintain the wastewater facility and systems). Duke Energy is not in violation of any term or condition of the Roxboro NPDES Permit.

122. A real, justiciable controversy exists between Plaintiff and Defendant over whether Duke Energy is in violation of the Roxboro NPDES Permit.

123. A declaratory judgment will advance the purposes of the Declaratory Judgment Act by settling the real and concrete controversy over whether Duke Energy is in violation of the Roxboro NPDES Permit.

COUNT SIX:
Declaratory Judgment that Roxboro is in compliance with the Act

124. Plaintiff re-alleges and incorporates by reference the allegations in Paragraphs 1 through 123 of the Complaint as if fully set forth herein.

125. RRBA asserts in its Notice that Duke Energy's operations at Roxboro are violating the requirements of the Act, an assertion that Duke Energy expressly denies.

126. A real, justiciable controversy exists between Plaintiff and Defendant over whether Duke Energy's operations at Roxboro violate the Act.

127. A declaratory judgment will advance the purposes of the Declaratory Judgment Act by settling the real and concrete controversy over whether Duke Energy's operations at Roxboro violate the Act.

COUNT SEVEN:
Declaratory Judgment that RRBA Cannot Collaterally Attack the Roxboro NPDES Permit

128. Plaintiff re-alleges and incorporates by reference the allegations in Paragraphs 1 through 127 of the Complaint as if fully set forth herein.

129. RRBA asserts in its Notice that the Roxboro NPDES Permit is not valid because it treats jurisdictional waters as part of Roxboro's Treatment Works.

130. DEQ issued the Roxboro NPDES Permit on April 9, 2007, pursuant to the requirements of the Act and the North Carolina NPDES Program.

131. RRBA did not challenge the terms of the Roxboro NPDES Permit prior to its issuance, as allowed under N.C. Gen. Stat. § 143-215.1(e).

132. The Roxboro NPDES Permit is valid and its terms remain in effect.

133. A citizen suit under the Act cannot be used to collaterally attack a facially valid NPDES permit.

134. A real, justiciable controversy exists between Plaintiff and Defendant over whether RRBA can now challenge the terms of the Roxboro NPDES Permit as inconsistent with the Act.

135. A declaratory judgment will advance the purposes of the Declaratory Judgment Act by settling the real and concrete controversy over whether RRBA can now challenge the terms of the Roxboro NPDES Permit as invalid under the Act.

COUNT EIGHT:
Declaratory Judgment that Diligent Prosecution of the State Action Bars RRBA's Claims

136. Plaintiff re-alleges and incorporates by reference the allegations in Paragraphs 1 through 135 of the Complaint as if fully set forth herein.

137. DEQ is diligently prosecuting an enforcement action against Duke Energy regarding the Roxboro plant. Ex. F.

138. In that action, DEQ seeks to abate all unauthorized discharges at Roxboro. *Id.* at Prayer for Relief. DEQ alleges in the Roxboro State Complaint that: (1) the Roxboro NPDES Permit "does not authorize the Defendant to make *any* outlet or discharge *any* wastewater or stormwater other than those included in the…Permit;" (2) unpermitted seeps have been identified at Roxboro, including "7 engineered discharges to the heated water discharge canal," and "2 stormwater discharges directly to Hyco Lake," and (3) "[a] seep or discharge…that is not included in the Roxboro NPDES Permit is an unpermitted discharge in violation of N.C. Gen. Stat § 143-215.(a)(1) and (a)(6)." *Id.* at ¶¶ 85-88 (emphasis added).

139. Among other things, DEQ seeks an injunction "requiring [Duke Energy] to abate [any] violations of N.C. Gen. Stat. § 143-125.1, NPDES Permits and groundwater standards" at Roxboro, and to "take the steps required in the . . . 'Ash Ponds Assessment Needs'" exhibit attached to DEQ's complaint. *Id.* at Prayer for Relief, ¶¶ 2-3.

140. In its March 13, 2017 Notice, RRBA alleged that Duke Energy has made unpermitted discharges of pollutants: (1) through unauthorized surface discharges to Waters of the United States (the Waste Treatment System Claims), (2) through unauthorized discharges to State Waters and Navigable Waters in violation of the removed substances provision of Duke Energy's Roxboro NPDES Permit (the Permit Claims), and (3) via hydrologically connected groundwater, in violation of the Act (the Hydrological Connection Claim). *See* Ex. A at 13-33.

141. Based on the plain language of RRBA's Notice and DEQ's Roxboro State Complaint, RRBA's Waste Treatment System Claims and Hydrological Connection Claim seek to enforce the exact same standards or limitations that DEQ was enforcing at the time RRBA served its Notice—"the unpermitted discharge of pollutants into protected waters." *See Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 441 (M.D.N.C. 2015) ("The Court thus finds that the Riverkeepers' Seep Claim and Hydrological Connection Claim seek to enforce the same standard or limitation as DENR's unpermitted seeps claim.").

142. DEQ is diligently prosecuting its enforcement action against Roxboro. The parties, including DEQ, have engaged in substantial discovery efforts, including conducting fact, expert, and Rule 30(b)(6) depositions of all parties. Over a million pages of documents have been produced, and multiple sets of written discovery have been served. The parties also conducted a site inspection of Roxboro by RRBA and DEQ. The discovery period closed on February 14, 2017. Although the parties (including RRBA) agreed to a short stay of the litigation thereafter, that stay expired on April 27, 2017.

143. The Act's citizen suit provision provides that a citizen may bring suit for an alleged violation of "an effluent standard or limitation under this chapter[.]" 33 U.S.C. § 1365(a). But no citizen suit may be brought "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order[.]" *Id.* § 1365(b)(1)(B). This "bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to ***supplement*** rather than to supplant governmental action," and citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (internal

quotation marks omitted) (emphasis added). Moreover, this "statutory bar is an exception to the jurisdiction granted in subsection (a) of § 1365, and jurisdiction is normally determined as of the time of the filing of a complaint." *Chesapeake Bay Found. v. Am. Recovery Co., Inc.*, 769 F.2d 207, 208 (4th Cir. 1985).

144. RRBA alleges in its Notice that DEQ is not diligently prosecuting the Roxboro State Enforcement Action, which Duke Energy denies.

145. A real, justiciable controversy exists between Plaintiff and Defendant over whether the diligent prosecution defense bars RRBA's ability to bring suit over its claims set forth in the Notice.

146. A declaratory judgment will advance the purposes of the Declaratory Judgment Act by settling the real and concrete controversy over whether RRBA can maintain a citizen suit under the Act for its claims set forth in the Notice.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

1. A declaratory judgment, pursuant to 28 U.S.C. § 2201, that:

    (a) the Treatment Works at Roxboro, including the ash basins (and the Southern Extension Impoundment and the Eastern Extension Impoundment), the Eastern Discharge Canal, the Heated Water Discharge Canal, and the Western Discharge Canal, are not "waters of the United States";

    (b) the Act does not regulate discharges to groundwater;

    (c) Roxboro's ash basins do not constitute unpermitted "point sources" for discharge to groundwater;

(d) the percolation of constituents from Roxboro's ash basins into groundwater does not violate the Act;

(e) Duke Energy is in compliance with the Roxboro NPDES Permit;

(f) Duke Energy is in compliance with the Act;

(g) RRBA cannot collaterally attack the Roxboro NPDES Permit; and

(h) the diligent prosecution defense bars RRBA from bringing its claims set forth in the Notice.

2. Such other relief as the Court may deem just and proper.

This the 11th day of May, 2017.

HUNTON & WILLIAMS LLP

_s/ Timothy J. Heaphy_______________________

Timothy J. Heaphy
VA Bar No. 68912
theaphy@hunton.com
Tyler S. Laughinghouse
VA Bar No. 84099
tlaughinghouse@hunton.com
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23212
Telephone: (804) 788-8200
Facsimile: (804) 788-8218

Attorneys for Plaintiff Duke Energy Progress, LLC